

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.111.5.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re SOPHIA B., a Person Coming Under
the Juvenile Court Law.

2d Juv. No. B220932
(Super. Ct. No. J-1219055)
(Santa Barbara County)

CHILD WELFRE SERVICES,

Plaintiff and Respondent,

v.

JUDITH B.,

Defendant and Appellant.

Judith B. appeals from a juvenile court order terminating parental rights to her six-year-year-old daughter, Sophia B. (Welf. & Inst. Code, § 366.26)¹ and the denial of a section 388 petition to reinstate reunification services. We affirm.

Section 361.5, subdivision (b)(10) provides that a juvenile court may bypass reunification services where a parent previously failed to reunify with the minor's sibling and failed to make reasonable efforts to correct the problems that led to the sibling being removed from the parent's custody. (See *Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96.) This is such a case.

¹ All statutory references are to the Welfare and Institutions Code.

The First Dependency Petition

On April 4, 2007, Santa Barbara County Child Welfare Services (CWS) filed a petition alleging that appellant was not caring for or protecting Sophia and three brothers who were at risk of suffering serious emotional damage. (§ 300, subds. (b) & (c).) Before the petition was filed, CWS received more than 50 referrals and provided services pursuant to two Voluntary Family Maintenance (VFM) plans. The first VFM, from December 22, 2005 through May 22, 2006, was initiated to address the oldest sibling's (T.B.) aggression and behavioral problems after he hit the siblings with a flashlight and threw a knife at his brother. Services ended after the family problems appeared to have subsided.

The second VFM, from February 8, 2007 to March 29, 2007, addressed the same behavioral and parenting issues. T.B. was hitting and punching appellant and assaulting the siblings. Appellant, the sole parent in the household, was unable to protect, supervise, or care for the children. Family maintenance services were provided but conditions in the home deteriorated.

The dependency petition alleged that appellant was not supervising or protecting the children, that the house was filled with trash and clutter, and that 14-year-old T.B. was choking and hitting the other children. A psychological evaluator reported that appellant suffered from depression and obsessive-compulsive hoarding which created a health hazard in the home. Appellant was emotionally detached from the children, abused drugs, and blamed others for her problems. The psychological evaluation stated that appellant had not benefited from services and "has been unwilling/unable to participate in and/or to follow up with some of the services aimed at helping her and/or her children."

At the June 13, 2007 disposition hearing, the trial court ordered reunification services and visitation. After appellant reunited with Sophia, Sophia's dependency was dismissed August 20, 2008. Two siblings remained in dependency and were returned to appellant's care.

On January 14, 2009, the siblings were removed due to appellant's failure to protect and care for the children. During a prior visit, appellant said that she was doing all she could to keep her job without shutting down from depression. Appellant admitted hitting the children and said that if CWS was unhappy with her parenting, that CWS should "[j]ust fucking take them."

Second Dependency Petition

Sophia was once again placed in protective custody. CWS filed a petition on January 20, 2009, alleging that the home was unsafe, and that appellant could not care for or supervise the children due to their mental health and behavioral problems and due to appellant's own mental health problems.² The petition alleged that corporal punishment was being used to discipline the children, that the siblings had been abused, and there was a substantial risk that Sophia would suffer serious physical harm if left in appellant's care. (§ 300, subds. (a), (b), (g), (j).)

On January 23, 2009, the trial court found the petition true and set the matter for a disposition hearing.

Bypass of Reunification Services

At the June 10, 2009 disposition hearing, the trial court bypassed reunification services pursuant to section 361.5, subdivision (b)(10). The court found that appellant had already received extensive services, had failed to reunify with Sophia's siblings, and had failed to alleviate the problems that previously led to the removal of Sophia and her siblings. The court set the matter for a section 366.26

² The petition alleged that the oldest sibling, T.B., was not returned to appellant's care after he was placed in protective custody in 2007 and reunification services were terminated. The petition further stated that Sophia's father, C.B., abducted the siblings in 2005 and was convicted of violation of a custody decree and sexual assault of a female minor. Father resided in Arkansas and was not able to care for or support Sophia.

hearing but stated that it "would welcome and invite a [section] 388 [petition] down the road a piece if in fact things clear up."³

Section 388 Petition to Reinstate Services

Appellant moved to continue the section 366.26 hearing and set the matter for a November 30, 2009 contested hearing. On November 24, 2009, six days before the hearing, appellant filed a section 388 petition to reinstate reunification services but failed to serve the petition on the social worker or Court Appointed Special Advocate. (See Cal. Rules of Court, rules 5.570(g), 5.524.)

CWS objected to the section 388 petition on the ground that it was untimely and factually insufficient. Appellant acknowledged that the intervening Thanksgiving holiday was a problem. "If the court feels the motion is untimely and does not want to hear it concurrently this morning with the .26 hearing, I would ask that the Court set the [section 388 petition] for its own separate hearing."

The trial court went forward with the section 366.26 hearing and continued the section 388 petition. Evidence was received that appellant failed to schedule an August supervised visit and had been arrested on theft and drug charges. Although appellant loved Sophia, appellant could not provide a safe and secure home. The case worker reported that Sophia was bonded to her foster parents and feels safe and secure in their home where she is dearly loved. The report stated: "This worker knows of no home that would be able to provide the permanency and meet Sophia's emotional, physical, and educational needs better than her current caregivers."

The Court Appointed Special Advocate (CASA) reported that that Sophia was thriving in the foster home, that the foster parents wanted to adopt, and that it was in Sophia's best interests to terminate parental rights.

³ Appellant filed a Notice of Intent to File Writ Petition to challenge the bypass order but failed to file a petition for extraordinary writ. We dismissed the writ petition on July 31, 2009. (B216810.)

At the conclusion of the hearing, appellant asked the trial court to reserve ruling on the termination of parental rights and set the section 388 petition for hearing. CWS argued that appellant had already received extensive services and that reinstating services was contrary to Sophia's best interests. The trial court terminated parental rights (§ 366.26) and continued the section 388 hearing to give CWS the opportunity to respond to the section 388 petition.

On January 6, 2010, the trial court reviewed the petition and opposition papers, heard argument, and denied the section 388 petition on the ground that it did not "see anything new in the petition."

Section 388 Petition

Appellant contends that the trial court erred in not considering the section 388 petition before terminating parental rights. Appellant, however, waived the error by agreeing to set the section 388 petition for a separate hearing. Having invited the error, appellant is precluded from arguing that the trial court abused its discretion in not considering the section 388 petition before going forward with the section 366.26 hearing. (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 501-502.)

Changed Circumstances

Waiver aside, the trial court did not err in denying the petition at the next hearing.⁴ Section 388 permits a party to petition the juvenile court to change, modify, or set aside a previous order. (§ 388; *In re A.S.* (2009) 180 Cal.App.4th 351, 357.) The petition must make a prima facie showing that there is a change of circumstances or

⁴ CWS opposed the petition based on the theory that the trial court lacked jurisdiction to modify or revoke a prior order once it terminated parental rights. Appellant, however, filed the section 388 petition before the section 366.26 hearing. The petition was denied before the order terminating parental rights became final. (See *In re Ronald V.* (1993) 13 Cal.App.4th 1803, 1805-1806 [order not final pending appeal].) Although the trial court thought it lacked "jurisdiction under section 366.26 to modify the order," it found that "I don't see anything new in the petition. Doesn't mean that at some time in the future there might be something new." We construe the comment to mean that it lacked jurisdiction to conduct a section 388 evidentiary hearing absent a threshold showing of changed circumstances.

new evidence, and that the proposed modification is in the child's best interests. (*Id.*, at p. at pp. 357-358.)

In determining whether the section 388 petition made a prima facie showing, the trial court properly considered the factual and procedural history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.) Appellant had already received family services dating back to 2005 and 14 months of formal reunification services which were terminated after appellant failed to reunify with the siblings. The petition stated appellant was making therapeutic progress but had not alleviated the substance abuse and mental health problems that led to the previous removal of the children. Appellant's circumstances were "changing" but had not changed within the meaning of section 388. (See *In re Cassey D.*, (1999) 70 Cal.App.4th 38, 47.)

The petition also fails to make a prima facie showing that it is in Sophia's best interest to delay adoption as the permanent plan. The petition alleges that reinstating reunification services will permit Sophia to continue her relationship with appellant and enhance Sophia's self-confidence. Sophia, however, needs a safe and secure home that only an adoptive placement will provide. Reinstating reunification services would deprive appellant "of a permanent, stable home in exchange for an uncertain future. [Citation.]" (*In re C.J.W.* (2007) 157 Cal.App.4th at 1075, 1081.)

In *In re Lesly G.* (2008) 162 Cal.App.4th 904, a section 388 petition was filed the day of the section 366.26 hearing and summarily denied. (*Id.*, at p. 911.) The Court of Appeal reversed on the ground that the petition made a prima facie showing of changed circumstances. "The [trial] court neither took testimony nor received documentary evidence, and it denied the petition without affording counsel an opportunity to argue the merits of the petition. In short, it provided no hearing whatsoever." (*Id.*, at p. 915.)

Unlike *In re Lesly G.*, the trial court set the section 388 petition for a separate hearing, permitted appellant to submit documentation and argue the matter, and denied the petition on the ground there was no new evidence or changed

circumstances. The court's manner in proceeding on the petition comported with due process. (*In re C.J.W.*, *supra*, 157 Cal.App.4th at pp. 1080-1081.)

Appellant's reliance on *In re Hashem H.* (1996) 45 Cal.App.4th 1791 is misplaced. There, the section 388 petition alleged that the mother had been in therapy for 18 months and that her progress was so successful that the therapist recommended reunification. (*Id.*, at p. 1799.) Mother had stable employment, was in joint counseling with her son, and was ready and able to care for her son on a full time basis. (*Ibid.*) The Court of Appeal concluded that the trial court abused its discretion in summarily denying the section 388 petition. (*Ibid.*)

Here the section 388 petition is based on evidence previously considered at the disposition and section 366.26 hearings. (See e.g., *In re H.S.* (2010) 188 Cal.App.4th 103, 109 [new expert opinion based on old evidence insufficient as a matter of law; section 388 petition summarily denied].) The petition states that appellant "continues to make therapeutic progress" and has cleaned up the house but is still addressing her substance abuse and mental health problems. Appellant is in the early stages of recovery and suffered a relapse, as evidenced by the arrest for theft and drugs. (See *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 ["It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform."].) Attached to the petition is a letter from a family therapist stating that appellant continues to suffer from anxiety and depression and has agreed to bi-weekly drug testing. Unlike *In re Hashem H.*, *supra*, 45 Cal.App.4th 179, the petition fails to make a prima facie showing that appellant has overcome her problems, that a therapist is recommending reunification, or that reinstatement of services is in Sophia's best interests.

The section 388 petition was filed at the eleventh hour and "offered a bare scintilla of proof that [appellant] was *beginning* to rehabilitate. But '[c]hildhood does not wait for the parent to become adequate.' [Citation.] A mere prima facie showing of changing – we hesitate to say, 'changed' – circumstances was not enough to

require or justify a hearing" on the petition. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.)

Parent/Child Relationship Exception

Appellant argues that the trial court erred in terminating parental rights because appellant Sophia will benefit from continuing a positive parent/child relationship. (§ 366.26, subd. (c)(1)(B)(i).) "If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

Appellant claims that she maintained regular visitation but failed to schedule a visit in August after she was arrested on theft and drug charges. Other than monthly supervised visits, there were no cards, letters, or phone calls from Sophia. Although the case worker and a therapist acknowledged a bond between appellant and Sophia, there was no evidence that appellant occupied a parental role in Sophia's life. (See e.g., *In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) "[T]he parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits. [Citation.]" (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.)

Substantial evidence supports the finding that the beneficial parental relationship exception does not apply. Sophia is strongly attached to her adoptive family, is thriving in their home, and wants to remain there. The foster parents, CWS case workers, and CASA case manager and worker were unanimous in reporting that Sophia needs stability and the sense of security that a permanent adoptive home will provide.

Sophia deserves the chance for a stable home. "A biological parent who has failed to reunify with an adoptable child may not derail adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.]" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

The order terminating parental rights and order denying the section 388 petition are affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Thomas R. Adams, Judge
Superior Court County of Santa Barbara

Jack A Love, under appointment by the Court of Appeal, forAppellant.

Dennis A. Marshall, County Counsel, County of Santa Barbara and
Gstavo E. Lavayen, Chief Deputy for Respondent